UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CABLEVISION SYSTEMS CORPORATION and CSC HOLDINGS, LLC, Plaintiffs, vs. VIACOM INTERNATIONAL INC. and BLACK ENTERTAINMENT TELEVISION LLC, Defendants.	:	Case No.: 13 CIV 1278 (LTS)(JLC)

<u>DECLARATION OF PERI L. ZELIG IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT</u>

I, Peri L. Zelig, make this declaration pursuant to 28 U.S.C. § 1746, and state as follows:

1. I am an associate of the law firm of Simpson Thacher & Bartlett LLP, attorneys for Defendants Viacom International Inc. and Black Entertainment Television LLC in the above-captioned matter. I am a member of the bar of the State of New York and of the United States District Court for the Southern District of New York. I submit this Declaration in further support of Defendants' Motion To Dismiss Plaintiffs' Amended Complaint. I am familiar with the facts and circumstances set forth herein, based on personal knowledge or the review of the attached documents or files maintained by my firm.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts from Programmer-Appellees' Answering Brief, *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9th Cir. 2012) (No. 09-56785), dated June 21, 2010.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from Cablevision and MSG Network, Inc.'s Memorandum of Law in Support of Cross-Motion to

Dismiss Complaint, *Moccio v. Cablevision Sys. Corp.*, 208 F. Supp. 2d 361 (E.D.N.Y. 2002) (No. 02-civ-2138), dated Apr. 19. 2002.

4. Attached hereto as Exhibit C is a true and correct copy of the Third Amended Complaint, *Brantley v. NBC Universal, Inc.*, No. CV 07-6101 CAS (VBKx) (C.D. Cal. Oct. 15, 2009), dated May 1, 2009.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts from Answer To Program Access Complaint, *In re* AT&T Servs., Inc. v. Madison Square Garden L.P. and Cablevision Sys. Corp. v. FCC, 26 FCC Rcd. 15871 (2011) (No. CSR-8196-P), dated Sept. 18, 2009.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of November, 2013, at New York, New York.

/s/ Peri L. Zelig

PERI L. ZELIG

EXHIBIT A

C.A. No. 09-56785

In the United States Court of Appeals for the Ninth Circuit

ROB BRANTLEY, DARRYN COOKE, WILLIAM AND BEVERLY COSTLEY, PETER G. HARRIS, CHRISTIANA HILLS, MICHAEL B. KOVAC, MICHELLE NAVARRETTE, JOY PSACHIE AND JOSEPH VRANICH,
***Plaintiffs /Appellants*,**

v.

NBC UNIVERSAL, INC., VIACOM, INC., THE WALT DISNEY COMPANY, FOX ENTERTAINMENT GROUP, INC., TURNER BROADCASTING SYSTEM, INC., TIME WARNER CABLE INC., COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC, COXCOM, INC., THE DIRECTV GROUP, INC., ECHOSTAR SATELLITE L.L.C., AND CABLEVISION SYSTEMS CORPORATION,
Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, Case No. CV-07-6101 CAS (VBKx)
The Honorable Christina A. Snyder, United States District Judge

PROGRAMMER-APPELLEES' ANSWERING BRIEF

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C.A. No. 09-56785

CORPORATE DISCLOSURE STATEMENT

Fox Entertainment Group, Inc.'s parent corporation is News Corporation, whose shares are traded on the NASDAQ stock exchange, and which is a publicly held corporation that owns more than 10% of Fox Entertainment Group, Inc.'s stock.

NBC Universal, Inc. is owned (through intermediate entities) by General Electric Company and Vivendi Universal, S.A., both of which are publicly held corporations. No other publicly held company owns more than 10% of the stock of NBC Universal, Inc.

No publicly held corporation beneficially owns 10% or more of the stock of Viacom, Inc.

No publicly held corporation beneficially owns 10% or more of the stock of The Walt Disney Company.

Turner Broadcasting System, Inc. is a wholly-owned subsidiary of Historic TW Inc., which is a wholly-owned subsidiary of Time Warner Inc. Time Warner Inc., a public-traded company, indirectly owns more than 10% of Turner Broadcasting System, Inc.'s stock.

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I INTRODUCTION

The district court correctly dismissed Plaintiffs' Third Amended Complaint for failure to state a Section 1 claim because Plaintiffs did not allege that cable affiliation agreements between television Programmers[1] and Distributors[2] have "injured competition" by foreclosing rival programmers.

Plaintiffs -- a putative class of television subscribers -- challenge a series of bilaterally negotiated vertical agreements between each Programmer and each Distributor under the Rule of Reason. They allege that Programmers, through these agreements, require Distributors to resell particular networks in "bundled tiers." Plaintiffs claim that these tiering requirements are an illegal restraint of trade because they restrict the choices available to consumers, allegedly forcing some consumers to pay more for cable television than they would pay if they could

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[1] The Programmers include Defendants NBC Universal, Inc., Viacom, Inc., The Walt Disney Company, Fox Entertainment Group, Inc., and Turner Broadcasting System, Inc. They own copyrighted television programming, which they sell in bundles as channels.

[2] The Distributors include Defendants Comcast Corporation, Comcast Cable Communications, LLC, CoxCom, Inc., The DIRECTV Group, Inc., Echostar Satellite L.L.C., Cablevision Systems Corp., and Time Warner Cable, Inc. They purchase cable programming from Programmers and sell it to consumers in repackaged "bundled tiers" that include programming from each Programmer.

buy fewer channels. Plaintiffs seek injunctive relief permitting consumers to subscribe only to those networks that they themselves select. (*See* AOB at 4.)[3]

The district court properly dismissed Plaintiffs' effort to use the antitrust laws to regulate the way in which Programmers and Distributors package programming, holding that Plaintiffs had failed to allege an essential element of every Sherman Act violation: injury to competition. As the Supreme Court recognized when it first adopted the Rule of Reason as the guiding principle for applying Section 1 nearly one hundred years ago, every contract restrains trade, but the Sherman Act outlaws only those restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911).

To survive a motion to dismiss, a Section 1 Rule of Reason claim must therefore allege that the alleged restraint injures competition. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). The Supreme Court and lower courts consistently require plaintiffs in vertical restraint cases to plead and prove that the restraints they challenge injure competition either (a) through horizontal collusion; or (b) by foreclosing rivals. Because Plaintiffs alleged neither collusion

[3] "AOB" refers to Appellants' Opening Brief; "ER" refers to Appellants' Excerpts of Record; and "SER" refers to Defendants-Appellees' Joint Supplemental Excerpts of Record.

or foreclosure, the district court properly dismissed Plaintiffs' Third Amended Complaint.

Plaintiffs concede that they have alleged neither foreclosure nor horizontal collusion. Instead, they maintain that they can show the requisite injury to competition simply by alleging that the bundling of cable channels by the Programmers limits the manner in which retailers can compete against each other in a downstream retail market, or causes a reduction in choice or higher prices at the consumer level.

That is not the law. Courts mandate that plaintiffs challenging the legality of all categories of vertical restraints under the Sherman Act plead and prove injury to competition through horizontal collusion or foreclosure of rivals, whether those restraints are characterized as territorial restrictions, price restrictions, exclusive dealing agreements, "most favored nation" agreements, boycotts, tying arrangements, block-booking, full-line forcing, or bundling. Plaintiffs cite no case -- not one -- holding that a vertical restraint violates the Sherman Act in the absence of horizontal collusion or foreclosure of rivals. Nor do Plaintiffs offer any authority that would justify abandoning the bedrock requirement that they plead horizontal collusion or foreclosure of competitors simply because none of the labels "fits" the restraint they challenge, or because the resulting consumer injury purportedly is widespread.

Plaintiffs are correct that, in some circumstances, some courts have concluded that reduced choice and increased prices can constitute "antitrust injury." But "injury to competition" is distinct from "antitrust injury," and is a separate element of a Section 1 claim. The "antitrust injury" requirement mandates that private plaintiffs asserting an antitrust violation must plead and prove not only that they have suffered injury-in-fact (which they may do by showing reduced choice or increased price), but also that their injury *resulted from "injury to competition."* If there is no "injury to competition," there can be no "antitrust injury."

Although reduced choice and higher prices may constitute "antitrust injury" *when they result from a lessening of competition* (which is not alleged here), they are not sufficient by themselves to show the required injury to competition. As the Supreme Court has recognized repeatedly, all vertical restraints, by definition, restrict how a dealer competes with other dealers in selling a manufacturer's products. This may often reduce the choices dealers can offer consumers and possibly increase the prices they charge. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) ("*Leegin*"). But those effects are not enough to condemn a restraint in the absence of facts showing that a restraint also harms interbrand competition either by excluding competing suppliers or by facilitating horizontal collusion. *Id.* at 895, 898.

Based on this principle, the Supreme Court and this Court have recognized that absent foreclosure, bundling is an entirely legitimate way for manufacturers to market their products, even in situations where it could lead to higher prices. *See Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 45 (2006) (bundling is "fully consistent with a free, competitive market"); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 895-97 (9th Cir. 2008). Were it not, bakers could not sell hot dog buns in packages of eight -- because some consumers might prefer fewer. Nor could publishers sell newspapers to consumers complete with each of the paper's separate sections (e.g., Sports, Calendar, Business, Food, etc.) -- because some consumers might not want some sections of the paper.

Plaintiffs' argument that choice reduction, even if accompanied by price increases, can suffice to show injury to competition constitutes a radical departure from nearly a century of antitrust decisions teaching that the Sherman Act is concerned only with the effect of a restraint on competition, not any collateral effects the restraint might have. *See Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 690 (1978) ("[T]he inquiry is confined to a consideration of impact on competitive conditions."). Competition is presumed to maximize consumer welfare, and courts have long been cautioned not to substitute their own judgment for the workings of a competitive marketplace. *See Standard Oil*, 221 U.S. at 65 (cautioning that a court may not "indulg[e] in general reasoning as to the

expediency or nonexpediency of having made the contracts"). The district court was right to dismiss Plaintiffs' complaint for failure to allege the requisite injury to competition. This Court should affirm.

II STATEMENT OF JURISDICTION

The district court had jurisdiction over this case, in which the underlying Complaint asserts a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. Judgment was entered by the district court on October 27, 2009 (ER 201), and Plaintiffs timely filed a notice of appeal on October 30, 2009 (ER 202). *See* Fed. R. App. P. 4(a)(1)(A).

III STATEMENT OF THE ISSUES

1. Does Plaintiffs' Third Amended Complaint allege facts sufficient to demonstrate that the vertical agreements between the Programmers and Distributors actually cause injury to competition?[4]

[4] Distributors' answering brief addresses Plaintiffs' lack of standing to pursue their claim. Programmers hereby join in the standing arguments raised by the Distributors.

IV STATEMENT OF THE CASE

A. Nature Of The Case

This appeal arises from the district court's order granting Defendants' motion to dismiss Plaintiffs' Third Amended Complaint with prejudice, and subsequent judgment in favor of Defendants.

B. Course Of The Proceedings And Disposition In The Court Below

The history of this case demonstrates why Plaintiffs ask this Court to relieve them of their obligation to plead and prove foreclosure of competing programmers. When the district court required Plaintiffs to plead foreclosure, they did so. But, when discovery began, and Plaintiffs presumably realized it would be impossible to prove foreclosure given the prevalence of independent network carriage and the ever-increasing number of cable channels, they abandoned the effort.

1. Plaintiffs' First Amended Complaint Is Dismissed For Failure To Allege Injury To Competition

Plaintiffs' initial Complaint, filed on September 20, 2007, asserted two claims for relief -- one under Section 1 of the Sherman Act and another under Section 2 for "conspiracy to monopolize." (SER 227-244.) Then, on December 3, 2007, Plaintiffs filed a First Amended Complaint ("FAC"), which asserted only one cause of action under Section 1. (SER 200-226.)

Defendants moved to dismiss Plaintiffs' FAC for failure to state a claim and for lack of standing. Defendants argued that Plaintiffs failed to allege that the

VI SUMMARY OF ARGUMENT

Plaintiffs have from this case's inception attempted to "reverse engineer" an antitrust claim from what they categorize as "consumer harm." They start from allegations that some television consumers purportedly purchase packages of programming that include networks they would not elect to purchase on an a la carte basis, at a total price that Plaintiffs allege is higher than these consumers would pay if cable and satellite providers were able to offer packages that are smaller or different than those currently offered (a claim that is itself based on wildly speculative premises and conclusions). From this, Plaintiffs reason that contracts between Programmers and Distributors that mandate "tiering" somehow must violate Section 1.

This is exactly the wrong way to determine whether the challenged agreements violate the antitrust laws. The first step in any Section 1 analysis is to identify the agreement or agreements subject to challenge. *See American Needle, Inc. v. National Football League*, 560 U.S. ___ (No. 08-661, May 24, 2010, Slip op. at 1). The next step is to determine whether those agreements unreasonably restrain trade. *See id.* This requires pleading and proof that the challenged agreements have "injured competition." *See, e.g.*, *Kendall*, 518 F.3d at 1047. *If*

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telecommunications information provided by the FCC to Congress"), *available at* http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%report%20081209.pdf.

there is a substantive violation, the Court must then examine whether the private plaintiffs have standing to challenge the restraint by virtue of having suffered "antitrust injury" -- that is, actual injury that is causally related to the competition-reducing aspect of defendants' behavior and is the sort of injury against which the antitrust laws were designed to protect. *See*, *e.g.*, Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990).

By contrast, Plaintiffs assert that their allegation that tiering requirements cause injury in the form of reduced choice and artificially high consumer prices "perfects" their antitrust claim. This is incorrect. Plaintiffs cannot "perfect" their claim until they first allege that the challenged agreements "injure competition." If and only if Plaintiffs satisfy the "injury to competition" element of their Section 1 claim would the court turn to the distinct question of whether Plaintiffs' claimed injuries -- reduced choice and higher prices -- result from that injury to competition. Allegations of reduced choice and/or high prices might suffice to show "antitrust injury" -- *if that injury results from the competition reducing aspect of conduct that violates Section 1.* Yet such allegations do not eliminate Plaintiffs' burden to plead and prove that the restraints *actually injure competition* -- an antecedent requirement that Plaintiffs have failed to meet here.

As the Supreme Court has stated, "the primary purpose of the antitrust law is to protect interbrand competition"-- a fact that Plaintiffs ignore. *See State Oil Co.*

v. Khan, 522 U.S. 3, 15 (1997). Interbrand competition in this case is competition as between the television programmers to sell programming. The TAC contains no allegations of "injury to competition" among the programmers -- for example, direct injury through horizontal collusion among the programmers (which Plaintiffs expressly disclaimed), or indirect injury through vertical agreements that have the effect of foreclosing rivals from this competition (which Plaintiffs also have expressly disclaimed).

Indeed, all types of vertical restraints courts have found illegal have involved the foreclosure of rivals. Plaintiffs cite no contrary vertical restraint cases, and instead argue that this Court should not consider itself bound by the pleading and proof requirements applied in other categories of restraints. That is disingenuous. *Of course* this Court should look to pleading and proof requirements in claims challenging analogous restraints, such as tying, full-line forcing, block booking, and bundling claims, all of which have required foreclosure of rivals.

Although Plaintiffs argue that they do not need to plead or prove programmer foreclosure, they have failed to offer any other legally sufficient basis for finding injury to competition.

First, the fact that the tiering restrictions facially restrict the manner in which Distributors compete against one another is legally insufficient. Virtually all vertical restraints that limit the competitive style or methods of retailers can be said

also to restrict the manner of downstream competition. That is their very nature and purpose.

Second, the fact that the tiering restrictions have allegedly resulted in increased prices or "overcharge" is legally insufficient. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) expressly held that vertical resale price maintenance agreements -- which necessarily and by design result in higher prices to consumers -- must be judged under the Rule of Reason. The *Leegin* Court expressly stated that vertical agreements affecting price could be found unlawful only upon a "further showing of anticompetitive conduct," i.e., injury to competition. *Id.* at 895. A finding that high prices themselves could constitute injury to competition would be completely contrary to the Supreme Court's holding in *Leegin*.

Third, the allegation that the tiering restrictions have allegedly reduced consumer choice is legally insufficient. Courts long have held that forcing buyers to purchase unwanted products is not itself illegal, absent foreclosure. *See Hirsch v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 n.19 (9th Cir. 1982) ("intrud[ing] upon consumers' freedom of choice by compelling purchase of unwanted products" is not a "sufficient independent basis for antitrust liability") (interpreting *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977)).

Plaintiffs would have this Court ignore the TAC's failure to allege injury to competition, and permit an antitrust plaintiff to make out a Section 1 claim simply by alleging consumer harm. This proposed standard is starkly at odds with nearly one hundred years of antitrust jurisprudence and runs counter to the decisions of both the Supreme Court and this Court, making injury to competition an essential element of any Section 1 claim.

For these reasons, the judgment of dismissal should be affirmed.

VII STANDARD OF REVIEW

The district court's ruling granting Defendants' motion to dismiss is subject to *de novo* review. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 932 (9th Cir. 2007); *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). The Court must determine whether Plaintiffs' TAC "contain[s] sufficient factual matter," which if accepted as true, "'state[s] a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In the antitrust context, "[d]ismissal for failure to state a claim is appropriate where 'the complaint states no set of facts which, if true, would constitute an antitrust offense, notwithstanding its conclusory language regarding the elimination of competition and improper purpose.'" *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783

(9th Cir, 1996) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) (quotations and alteration omitted)).

VIII ARGUMENT

A. Plaintiffs Must Plead Injury To Competition, A Required Element Of Their Sherman Act Claim

1. Vertical Restraints Are Legal Unless Plaintiffs Plead And Prove That They Cause Injury To Competition

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Recognizing that nearly *every* contract binding parties to an agreed course of conduct amounts to some sort of "restraint of trade," the Supreme Court has limited the restrictions of Section 1 to bar only "unreasonable restraints." *State Oil Co.*, 522 U.S. at 10; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984).

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin*, 551 U.S. at 885 (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)). The Rule of Reason "focuses directly on the challenged restraint's impact on competitive conditions," and the "inquiry mandated by the Rule of Reason is whether the challenged agreement is one that

promotes competition or one that suppresses competition." *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 688, 691 (1978).[7]

To state a Section 1 claim subject to the Rule of Reason, Plaintiffs must allege "evidentiary facts," that, if true, establish: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade . . .; (3) ***which actually injures competition***." *Kendall*, 518 F.3d at 1047 (emphasis added). *See also Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290-91 (9th Cir. 1979) ("Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case."). "Whether specific conduct is anti-competitive[, i.e., whether it injures competition,] is a question of law." *SmileCare*, 88 F.3d at 783.

2. Injury To Competition Is Distinct From And A Prerequisite To Antitrust Injury

Separate and apart from injury to competition, Plaintiffs also must allege that they suffered "antitrust injury," i.e., some harm of the type that the antitrust

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[7] Certain types of restraints, such as horizontal price-fixing arrangements, are presumed to injure competition, and courts deem those agreements *per se* unlawful without subjecting them to the more rigorous analysis required by the Rule of Reason. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). Plaintiffs acknowledge, however, that the vertical restraints they challenge are not *per se* unlawful, and the Court should assess them under the Rule of Reason. (*See* AOB at 38.)

equally or more efficient competitor."); IX Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1711a, at 101 (2d ed. 2004) ("price discrimination is not a warrant for condemning a tie that is not objectionable on other grounds").

ii. Reduction In Consumer Choice Is Not Tantamount To Injury To Competition

Similarly, reduction in "consumer choice" for some consumers cannot establish injury to competition. As the district court explained in its order dismissing Plaintiffs' FAC, while "a reduction in consumer choice can be a sign of anticompetitive effects," to state a Section 1 claim, Plaintiffs must plead "additional facts that would allow the Court or a jury to differentiate between lack of choice caused by harm to competition and lack of choice flowing from normal competitive processes." (SER 193.)

It is not enough for Plaintiffs to allege that each Programmer's alleged bundling caused Distributors to purchase programming they would not have acquired had they been able to "separately negotiate channel-by-channel," and that but for the agreements between Programmers and Distributors, Distributors would offer "unbundled" cable options to consumers. (ER 184 ¶¶ 43-44.) Antitrust law does not give buyers the right to demand that multi-product sellers, such as the Programmers, make their wares available in every possible combination. *See Hirsch*, 674 F.2d at 1349 n.19 (9th Cir. 1982) ("intrud[ing] upon consumers'

freedom of choice by compelling purchase of unwanted products" is not a "sufficient independent basis for antitrust liability") (interpreting *Continental T. V.*, 433 U.S. at 53 n.21); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 488 (3d Cir. 1992) (recognizing that "some customers would be most happy purchasing every option or feature a la carte," but finding such preferences insufficient to show "consumer injury through anticompetitive forcing.").[17]

Accordingly, in the absence of allegations demonstrating actual injury to competition (such as allegations of foreclosure of competitors or horizontal collusion), to the extent it relies on allegations of reduction in consumer choice to establish injury to competition, Plaintiffs' TAC fails to state a claim under Section 1. *Cf. Jefferson Parish*, 466 U.S. at 16 ("[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion

[17] This principle is underscored by the observation that, in the context of cable television, it is far from obvious that a "channel" -- as opposed to a particular television series, or even episode -- is the unit of entertainment "product" that some consumers might wish were offered a la carte. Some television watchers, for example, might want to watch "American Idol" (Fox) but not "Glee" (also on Fox); or some might want to watch only the final episode of American Idol, but not the preliminary episodes. Should all of these consumers be permitted to bring antitrust claims seeking to force Programmers and Distributors to sell their programming entertainment in the unit size and combination that the particular consumers most prefer?

of the market which would otherwise have been available to other sellers has been foreclosed.”).

c. Aggregating The Agreements Does Not Advance Plaintiffs’ Claim

Finally, Plaintiffs suggest that this case is somehow different than others that came before because it involves multiple vertical agreements, whose aggregate effects somehow reflect a cognizable antitrust violation. This argument is conceptually flawed. Plaintiffs take an economic effect -- higher prices and diminished choice -- and assert that it is sufficient to state a Section 1 claim because it is widespread throughout the market. But consumer harm that does not flow from injury to competition is not actionable under the Sherman Act, no matter how widespread. Aggregating a series of agreements that individually are not alleged to injure competition cannot result in inferred injury to competition. For this reason, the dicta in *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 588 F.3d 659 (9th Cir. 2009) (per curiam) that Plaintiffs cite for the suggestion that bilateral contracts can be aggregated is irrelevant. Zero plus zero still equals zero. *See, e.g., Abcor Corp. v. AM Int’l*, 916 F.2d 924, 930-31 (4th Cir. 1990) (finding that aggregating a defendant’s acts, none of which is anticompetitive individually, does not demonstrate an antitrust violation).

IX CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order dismissing the Third Amended Complaint with prejudice.

Respectfully submitted,

DATE: June 21, 2010

MUNGER, TOLLES & OLSON LLP

By: /s/ David C. Dinielli
David C. Dinielli*

Counsel for Defendant/Appellee Fox Entertainment Group, Inc.

**With Permission for All Programmer-Defendants/Appellees*

EXHIBIT B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORIGINAL

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D
★ APR 19 2002 ★
4/30/02
LONG ISLAND OFFICE

SALVATORE MOCCIO, ROSE MOCCIO, ROBERT GROSSMAN, NORMAN LEVINSOHN and HOWARD WINSTON,

As Individuals and as Class Representatives,

Plaintiffs,

- against -

CABLEVISION SYSTEMS CORPORATION, the YANKEENETS, INC., d/b/a NEW YORK YANKEES, YANKEES ENTERTAINMENT AND SPORTS NETWORK, LLC, and MSG NETWORK, INC.;

Defendants.

CV-02-2138 (TCP) (ETB)

CABLEVISION SYSTEMS CORPORATION AND MSG NETWORK, INC.'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

x

SALVATORE MOCCIO, ROSE MOCCIO,
ROBERT GROSSMAN, NORMAN LEVINSOHN
and HOWARD WINSTON,

As Individuals and as Class Representatives,

Plaintiffs,

CV-02-2138 (TCP) (ETB)

- against -

CABLEVISION SYSTEMS CORPORATION,
the YANKEES, INC., d/b/a NEW YORK YANKEES,
YANKEES ENTERTAINMENT AND SPORTS
NETWORK, LLC, and MSGNETWORK, INC.;

Defendants.

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CABLEVISION SYSTEMS CORPORATION AND MSG NETWORK, INC.'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants Cablevision Systems Corporation ("Cablevision") and Madison Square Garden, L.P., sued herein as MSG Network, Inc. ("MSG"),[1] respectfully submit this memorandum of law in support of their cross-motion to dismiss the complaint as against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In addition, we rely upon the affidavits of Cablevision's Senior Vice President Consumer Product Management Patricia Falese and Vice President of Customer Service Rocky Boler, and the exhibits annexed thereto, in support of this motion.

[1] Contrary to the allegations in plaintiffs' complaint, MSG is not wholly owned by Cablevision. Through various corporate entities, it is owned 60% by Rainbow Media Holdings, Inc., which itself is 77.5% owned by Cablevision. Through various other entities, FOX Sports Networks, LLC, an unrelated entity, owns the other 40% of MSG. *See* Falese **Aff.** ¶ 1 **n.**1. In the interests of efficiency and economy, and given that defendants believe plaintiffs have completely failed to state any viable claims for relief, Cablevision and MSG have elected to appear on these motions through common counsel.

Simultaneously with this motion to dismiss the complaint, Cablevision and MSG are also opposing in a separate memorandum plaintiffs' motion for a preliminary injunction and for other relief. We ask the Court to consider the arguments advanced on this motion to dismiss in the context of our opposition to plaintiffs' motion for a preliminary injunction.

* * *

~~Plaintiffs and their counsel~~ have chosen to use the federal court to ~~air their opinions~~ about matters that do not belong in any court, and their complaint should be summarily dismissed. Simply put, plaintiffs have no constitutional, statutory, contractual or innate right to require Cablevision to negotiate for and obtain the rights to provide Yankees games to Cablevision subscribers. **As** the federal statute governing cable communications recognizes, not even government – let alone cable subscribers such as plaintiffs – can order cable operators to offer particular programs to cable customers. In fact, the relief sought here flies in the face of the First Amendment.

Plaintiffs thus have no viable claim to support the relief they seek in their complaint. The fact is that none of the legal theories alleged in the complaint – even if valid claims were stated – could give rise to the extraordinary and unprecedented relief sought in the complaint. Moreover, a review of the allegations set forth in the complaint compels the conclusion that each and every claim must be dismissed because none states any claim upon which relief may be granted.

Point III

PLAINTIFFS' SHERMAN ACT CLAIM IS LEGALLY DEFICIENT

Plaintiffs' Sherman Act claim is skeletal. Plaintiffs do not specify in their complaint the particular sections of the Sherman Act that they alleged were violated. In fact, with respect to Cablevision and MSG, the antitrust claim consists of the following three paragraphs (aside from the obligatory "repeat and reallege" paragraph):

> **83.** Upon information and belief, Cablevision and MSGN, acting in concert, have appreciable market power to appreciably restrain trade in the market and have exerted their market power in an unreasonable manner to compel sales of the tied-in products, and the tie-in effects a substantial amount of interstate commerce.
>
> **85.** Upon information and belief, the Cablevision Defendants and the Yankee Defendants have acted in concert in employing their market power in an unreasonable way and have in so doing appreciably restrained trade, effecting a substantial amount of interstate commerce.
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> **86.** Alternatively, the anti-competitive behavior complained of is of a type so inimical to competition as to be per se illegal.

Those allegations do not even provide the bare minimum details required to put Cablevision and MSG on notice as to what conduct is alleged to constitute the illegal "tying" referenced in passing in paragraph a3.

It appears from the introductory allegations of the complaint that plaintiffs are attempting to allege that Cablevision and/or MSG engaged in illegal activity by tying "receipt of the MSG programming to 'premium' packages of other channels which the customers may order only upon payment of an enhanced fee." *Id.* ¶ 23; *see also id* ¶¶ 24-27. However, the conduct alleged does not provide a basis for a Sherman Act claim. In fact, it fails both as a matter of fact and as a matter of law.

"A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Yentsch v Texaco, Inc.*, 630 F.2d 46, 56 (2d

Cir. 1980) (internal quotations omitted). The Second Circuit enumerated the elements of a tying claim as follows:

> We have required allegations and proof of five specific elements before finding a tie illegal: first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

Hack v. President and Fellows of Yale Coll., 237 F.3d 81, 86 (2d Cir. 2000), *cert. denied,* 112 S.Ct. 201 (2001). This standard applies for tying claims under both the Sherman Act and the Clayton Act. *See De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996). It also governs claims under the Donnelly Act, the New York State counterpart to the federal antitrust laws. *See X.L.O. Concrete Corp. v. Rivergate Corp.*, 611 N.Y.S.2d 786, 789 (1994) ("Donnelly Act, having been modelled on the Federal Sherman Act of 1890, should generally be construed in light of Federal precedent") (internal citations omitted).[4]

As noted above, plaintiffs' allegations of an unlawful "tying" arrangement fail on the facts and the law. First, the allegations of the complaint are contradicted by the documents referenced in the complaint. While plaintiffs allege that Cablevision's subscribers must subscribe to a premium tier of programming, *i.e.*, the "Family Cable" package, in order to purchase the MSG Network, *see* Compl. ¶ 25, that is not the case. The MSG Network may be purchased separately by the plaintiffs without subscribing to a "premium" tier of programming. *See* Falese Aff. ¶ 3 and Exhibit "A."

Inasmuch as plaintiffs, in bringing this claim, "relie[d] heavily upon" the "terms and effect" of Cablevision's rate card – which unequivocally establishes that the MSG Network may be purchased independent of premium programming packages – the rate card is "'integral' to the complaint" and may

[4] Although plaintiffs assert no Donnelly Act claim in their complaint. the Donnelly Act is mentioned in plaintiffs' Memorandum of Law. *See* Pls.' Mem. of Law at 15.

be considered on the present-motion to dismiss. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 151 (2d Cir. 2002). Moreover, the complaint's allegation that Cablevision's subscribers must subscribe to a premium tier of programming, *i.e.*, the "Family Cable" package, in order to purchase the MSG Network, see Compl. ¶ 25, is flatly contradicted by the rate care and, therefore, not entitled to a presumption of truth on the present motion. *See Matusovsky v. Merrill Lynch,* 186 F. Supp. 2d 397,400 (S.D.N.Y. 2002); *Honess* 52 *Corp. v. Town of Fishkill,* 1 F. Supp. 2d 294,296 (S.D.N.Y. 1998).

Further, as is described more fully in our Memorandum in Opposition to Preliminary Injunction, at page 6, federal law requires that customers subscribe first to a "basic service tier" in order to purchase any other program or service. *See* 47 U.S.C. § 543(b)(7) (2002); 8 F.C.C.R. 5631 ¶ 165 (1993), 1993 WL 757189. Thus, the requirement that a subscriber purchase "Broadcast Basic" from Cablevision in order to subscribe to the MSG Network is entirely consistent with controlling federal law.

Notably, a claim similar to that advanced by plaintiffs was made in a state court action, under the New York State counterpart to the Sherman Act, and was dismissed based upon the fact that the programming could be purchased separately. *See Bello v. Cablevision Sys. Corp.*, 587 N.Y.S.2d 1, 3 (2d Dep't 1992) ("a review of the Rate Card indicates that the programming services which are allegedly being tied may be purchased individually, and, therefore, no 'tying' claim may lie"). Thus, the indisputable facts do not support plaintiffs' "tying" claim.

However, even assuming the truth of the facts alleged in the complaint, and ignoring the numerous deficiencies in the pleading, the "tying" claim fails as a matter of law. Plaintiffs allege that in order to obtain the MSG Network they were forced to purchase programming, the "tied" product, that they would not have otherwise purchased. *See* Compl. ¶ 24.[5] The law is settled that no tying claim lies

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[5] Paragraph 24 of the complaint provides as follows: "This 'tying' of MSG programming to less desired channels and programming forces subscribers to order stations they do not wish to, ranging from the Food Network to the Game Show Network. in order to receive MSG and thus the exclusively-broadcast Yankee games."

where the purchaser would not have purchased the tied product at all absent compulsion. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 16 (1984) ("when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed").

The Supreme Court's enunciation in *Jefferson Parish* was recently applied by the court in *Cancall PCS, LLC v. Omnipoint* ***Corp.,*** No. 99 Civ. 3395 (AGS), 2001 WL 293981 (S.D.N.Y. March 26,2001). There, the plaintiff alleged that one of the defendants (Omnipoint, a provider of wireless communication access and service) engaged in an unlawful tying arrangement by refusing to sell air time on its wireless network except to consumers who purchased handsets compatible with the network. ***See id.*** at *2-3. The court dismissed the action, noting that the plaintiff alleged that it would not have bought the tied product, *i.e.*, the handsets, absent the alleged tying arrangement:

> The Supreme Court's statement aptly describes the situation here. Cancall asserts that, but for the alleged tie, it would not have bought handsets for resale to consumers who already had handsets compatible with the Omnipoint PCS/GSM network. Since Cancall would not have bought the "extra" or "additional" handsets from any seller, no competition was foreclosed in the market for the tied product. *See Gonzalez v. St. Margaret's House Hous. Dev. Fund,* 880 F.2d 1514, 1518 (2d Cir. 1989) (doubtful that competition **was** foreclosed in tied market where, absent compelled link between housing and prepared meals, residents of housing development would probably not have purchased prepared meals at all); *Yentsch,* 630 F.2d at 57-58 (unlikely that there were anticompetitive effects in the tied market where testimony suggested that, absent compulsion, plaintiff would not have purchased tied products at all).

2001 WL 293981, at *5.

Because plaintiffs allege that they did not wish to purchase the premium programming, *i.e.*, the "tied" product, from a competitor of Cablevision. *see* Compl. ¶ 24, no injury to competition can result from the alleged tying arrangement.

It must also be noted that plaintiffs have not suffered any legally cognizable injury, never mind one for which the antitrust laws provide a remedy. It has, for many months, been common knowledge that the MSG Network has no legal ability to broadcast Yankees baseball games. If plaintiffs subscribed to Cablevision and/or the MSG Network for the sole purpose of watching Yankees games, they need not continue their subscriptions. They have the ability to downgrade their Cablevision service to unsubscribe to the MSG Network, or to discontinue their Cablevision service altogether. There is no injury.

* * *

For the foregoing reasons, plaintiffs' Sherman Act claim is legally deficient and mus be dismissed.

EXHIBIT C

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ROB BRANTLEY, DARRYN COOKE, WILLIAM and BEVERLEY COSTLEY, PETER G. HARRIS, CHRISTIANA HILLS, MICHAEL B. KOVAC, MICHELLE NAVARRETTE, JOY PSACHIE, and JOSEPH VRANICH, individually and on behalf of all others similarly situated, Plaintiffs, vs. NBC UNIVERSAL, INC., VIACOM INC., THE WALT DISNEY COMPANY, FOX ENTERTAINMENT GROUP, INC., TURNER BROADCASTING SYSTEM, INC., TIME WARNER CABLE INC., COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC, COXCOM, INC.,THE DIRECTV GROUP, INC., ECHOSTAR SATELLITE L.L.C., and CABLEVISION SYSTEMS CORPORATION, Defendants.	CASE NO. CV07-06101 CAS(VBKx) **CLASS ACTION** THIRD AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE SHERMAN ANTITRUST ACT AS TO ALL DEFENDANTS EXCEPT CHARTER COMMUNICATIONS, INC. (15 U.S.C. § 1) JURY DEMANDED

Plaintiffs, on their own behalf and on behalf of all others similarly situated, file this Third Amended Complaint seeking damages and injunctive relief pursuant to 15 U.S.C. §§ 15 and 26, based on violations of Section 1 of the Sherman Act (15 U.S.C. § 1), and complain and allege as follows:

I.

NATURE OF THE CASE

1. This consumer class action specifically challenges the written contracts between the programmer defendants NBC Universal, Inc., Viacom Inc., The Walt Disney Company, Fox Entertainment Group, Inc., and Turner Broadcasting System, Inc. (collectively the "programmer defendants"), and the distributor defendants Time Warner Cable Inc., Comcast Corporation, Comcast Cable Communications, LLC, Coxcom, Inc., the Directv Group, Inc., Echostar Satellite L.L.C., Charter Communications, Inc., and Cablevision Systems Corporation (collectively the "distributor defendants") which, by the express terms of the agreements, artificially restrain trade by impeding the development of a properly functioning competitive market among and between cable, satellite and telecommunications distributors for the distribution of cable channels and programming to consumers. These programmer defendants own the vast majority of the channels offered to the public by the distributors, and their market power stems from their control of programming which distributors must have to function. (See Exhibit 1 attached hereto and incorporated herein). Under the terms of the written contracts, the programmer defendants, by virtue of their market power (as set forth more fully below), mandate that all distributors must (1) purchase the entire output of a particular programmer, (2) offer their channels in a prescribed manner within the expanded basic cable tier as directed by the

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programmers, and (3) offer consumers access to expanded basic cable television channels in the form of prepackaged bundled tiers at artificially inflated prices; (distributors are prohibited from offering the channels on an individual or unbundled basis) and (4) keep the terms of the written contracts secret. As a consequence, consumers are denied the choices that a competitive market, free of artificial and anticompetitive contractual restraints, would provide, including the opportunity to purchase on an unbundled basis, thereby avoiding the supracompetitive surcharge paid for forced bundles. Indeed, the Federal Communications Commission ("FCC") has issued an extensive report explaining that in a competitive marketplace in which consumers are given choice by means of unbundled offerings (based upon traditional economic notions of supply and demand) "a consumer could cut his [or her] programming bills merely by electing to purchase fewer networks." FCC, *Further Report On the Packaging and Sale of Video Programming Services to the Public* at 47 (February 9, 2006). The FCC estimates that the typical American consumer is only interested in watching 17 cable channels. Therefore, the existing requirement that consumers purchase 50 or more expanded basic cable channels in the form of bundled tiers results in consumers paying inflated prices for the channels they do want to watch. The FCC estimates that the failure to offer consumers the choice of purchasing unbundled cable channels results in a total overcharge to consumers in excess of $100 million per year.

2. The programmer defendants are media entities that collectively own or control the major broadcast (free) television networks in the United States. These companies also own or control most of the major cable channels. The programming exhibited on these broadcast channels and cable channels is usually "unique" and protected by copyright law. Each

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programmer defendant, because of its full or partial ownership of a broadcast channel and its ownership or control of multiple important cable channels, has a high degree of market power vis-a-vis all distributors. Accordingly, each programmer defendant can dictate to distributors (whether cable, satellite or fiber optics) that as a condition to purchasing each programmers' broadcast channel and its "must have" cable channels (together these are the tying product) the distributor must also acquire and resell to consumers all the rest of the cable channels owned or controlled by each programmer (together these are the "tied" product[s]). As a consequence, distributors can offer consumers only prepackaged tiers of cable channels which consist of each programmers' entire offering of channels. Distributors must agree they will not offer unbundled cable channels to consumers. Moreover, the programmers specify how their channels or networks appear on either the basic or expanded basic tier. Finally, the contract obligates the distributor not to disclose these terms. It is a commercial necessity that each distributor must have on its network each programmer's copyrighted major broadcast network (CBS, NBC, ABC, FOX, CW) and the most important copyrighted cable channels owned or controlled by each programmer defendant, each distributor is practically required to accept the contractual requirement that each distributor not offer unbundled cable channels to consumers. These provisions operate as an enforcement mechanism to insure that each programmer can, without competing with any other programmer, require distributors to take its full product offering without serious negotiations. Accordingly, the programmers' market power has produced a relationship between programmers as a group, and distributors, as a group, which are the product of a distorted and anticompetitive market brought about by the exercise of market power by the programmer defendants who seek to

avoid competing with one another and with independent programmers for access to distributor systems. Each programmer defendant is aware of this power and each exercises its own power to insure it can maximize its revenues by selling its entire line of channels to distributors without serious negotiation. The programmers, collectively and individually, have no economic incentive or interest to alter the existing market conditions because any effort by even one programmer to offer unbundled cable channels would undermine its ability to force purchase of all or substantially all of its channels. It is for this same reason that the programmers exercise their market power and prevent the distributors from offering cable channels to consumers on an unbundled basis. The market power of the programmers and the anticompetitive effects of their contracts with distributors should be judged by assessing the aggregate effect of all programmer-distributor contracts.

3. The named cable provider defendants, Time Warner Cable, Inc., Comcast Cable Communications, LLC, Charter Communications, Inc., Cablevision Systems Corporation, and CoxCom, Inc., are the entities that collectively dominate the distribution of channels for exhibition to the public. The two satellite provider defendants, The DIRECTV Group, Inc., and EchoStar Satellite L.L.C. (DISH) are the two largest providers of broadcast and cable television via satellite in the United States. More recently, there has developed a third category of distributor, mainly telephone companies (AT&T and Verizon) which transmit cable channels to viewers via fiber optic cable. The distributor defendants, and the fiber optic distributors, collectively control access to the homes in the United States that desire to view cable channels. In a normal competitive market, as opposed to the existing distorted, artificial, and anticompetitive market, these three categories of distributors, who are competing with each other

to sign up consumers, would develop ways to differentiate themselves from one another. A principle way to accomplish this would be to offer consumers channels either on an unbundled basis. Because either a la carte or smaller user friendly packages are actually or practicably prohibited by the programmers' contracts with each distributor, the consumer is forced to purchase the full tier of usually 50 or more channels bundled together at a price that substantially exceeds a market-based-price for the channels that the consumer desires to watch.

4. The result of this series of written contractual restraints is that there is little or no competition among programmers because each defendant programmer has – and exercises – the market power to force each distributor to take a full line of broadcast and cable channels and to prohibit each distributor from reselling to consumers on an unbundled basis. Moreover, as explained above, competition among distributors for consumer business has been significantly suppressed and eliminated because their creativity in offering smaller packages or channels on an unbundled basis has been circumscribed by the contract between each distributor and each programmer which prohibits such offerings. Dish Network explained the problem in a January 4, 2008 filing with the FCC: "The ability of providers [distributors] to test a la carte or new package tiers in any comprehensive manner is limited by the contractual limitations imposed by cable and broadcaster-affiliated content."

5. Accordingly, there exists two levels of noncompetition in connection with cable television exhibition in the United States which has deprived consumers of choice and caused them to pay inflated prices for cable television. A recent study by the FCC concludes that the practices described in this Complaint are costing the cable television consumers about $100,000,000 per year in excess payments.

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6. This class action seeks to eliminate those provisions of the contracts between (1) programmers and distributors and (2) distributors and consumers which contain the unlawful offering to consumers of only bundled or prepackaged bundled tiers so the market responds to the forces of competition. It also seeks reimbursement of overcharged damages during the past four year statutory period.

II.

PARTIES

Plaintiffs and Class Representatives

7. Plaintiff ROB BRANTLEY resides in Arlington, Virginia. During the period covered by this Complaint, plaintiff BRANTLEY has been and continues to be a subscriber of cable programming services provided by defendant COMCAST CORPORATION. Plaintiff BRANTLEY does not desire all of the channels that he is required to buy from defendant COMCAST CORPORATION and would prefer to purchase specific channels on an unbundled basis.

8. Plaintiff DARRYN COOKE resides in Costa Mesa, California. During the period covered by this Complaint, plaintiff COOKE has been and continues to be a subscriber of cable programming services provided by defendant TIME WARNER CABLE, INC. Plaintiff COOKE does not desire all of the channels that he is required to buy from defendant TIME WARNER CABLE, INC. and would prefer to purchase specific channels on an unbundled basis.

9. Plaintiffs WILLIAM AND BEVERLEY COSTLEY, a married couple, reside in San Pedro, California. During the period covered by this Complaint, the COSTLEY plaintiffs have been and continue to be subscribers of broadcast satellite programming services provided by defendant ECHOSTAR SATELLITE L.L.C. Plaintiffs WILLIAM and

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BEVERLY COSTLEY do not desire all of the channels that they are required to buy from defendant ECHOSTAR SATELLITE L.L.C. and would prefer to purchase specific channels on an unbundled basis.

10. Plaintiff PETER G. HARRIS resides in Pasadena, California. During the period covered by this Complaint, Plaintiff HARRIS has been and continues to be a subscriber of cable programming services provided by defendant CHARTER COMMUNICATIONS, INC. Plaintiff HARRIS does not desire all of the channels that he is required to buy from defendant CHARTER and would prefer to purchase specific channels on an unbundled basis.

11. Plaintiff CHRISTIANA HILLS resides in San Pedro, California. During the period covered by this Complaint, plaintiff HILLS has been and continues to be a subscriber of cable programming services provided by defendant COXCOM, INC. Plaintiff HILLS does not desire all of the channels that she is required to buy from defendant COXCOM, INC., and would prefer to purchase specific channels on an unbundled basis.

12. Plaintiff MICHAEL B. KOVAC resides in Berkeley, California. During the period covered by this Complaint, plaintiff KOVAC has been and continues to be a subscriber of broadcast satellite programming services provided by defendant THE DIRECTV GROUP, INC. Plaintiff KOVAC does not desire all of the channels that he is required to buy from defendant THE DIRECTV GROUP, INC., and would prefer to purchase specific channels on an unbundled basis.

13. Plaintiff MICHELLE NAVARRETTE resides in Playa del Rey, California. During the period covered by this Complaint, plaintiff NAVARRETTE has been and continues to be a subscriber of broadcast satellite programming services provided by defendant THE DIRECTV GROUP, INC. Plaintiff NAVARRETTE does not desire all of the channels

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that she is required to buy from defendant THE DIRECTV GROUP, INC., and would prefer to purchase specific channels on an unbundled basis.

14. Plaintiff JOY PSACHIE resides in Riverdale, New York. During the period covered by this Complaint, Plaintiff PSACHIE has been and continues to be a subscriber of cable programming services provided by defendant CABLEVISION SYSTEMS CORPORATION. Plaintiff PSACHIE does not desire all of the channels that she is required to buy from defendant CABLEVISION and would prefer to purchase specific channels on an unbundled basis.

15. Plaintiff JOSEPH VRANICH resides in Irvine, California. During the period covered by this Complaint, Plaintiff VRANICH has been and continues to be a subscriber of cable programming services provided by defendant COXCOM, INC. Plaintiff VRANICH does not desire all of the channels that he is required to buy from defendant COX COMMUNICATIONS, INC., and would prefer to purchase specific channels on an unbundled basis.

Defendants

16. Defendant NBC UNIVERSAL, INC. (hereinafter "NBC") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. Defendant NBC is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

17. Defendant VIACOM INC. (hereinafter "Viacom") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. Viacom is a leading global entertainment company engaged in, inter alia, the development and

production of cable and film programming and has a substantial interest in a number of cable channels.

18. Defendant THE WALT DISNEY COMPANY (hereinafter "Disney") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Burbank, California. Defendant Disney is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

19. Defendant FOX ENTERTAINMENT GROUP, INC. (hereinafter "Fox") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Los Angeles, California. Defendant Fox is a media entity engaged in, inter alia, the dissemination of entertainment, news and information to a global audience in part through broadcast networks, cable television and partial ownership of a satellite provider.

20. Defendant TURNER BROADCASTING SYSTEM, INC. (hereinafter "Turner") is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Atlanta, Georgia. Defendant Turner is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

21. Defendant TIME WARNER CABLE, INC. (hereinafter "TWC") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Stamford, Connecticut. TWC is the second largest operator of cable television systems in the United States.

22. Defendant COMCAST CORPORATION is a corporation organized and existing under the laws of the State of Pennsylvania with its

principal place of business in Philadelphia, Pennsylvania. Defendant COMCAST CABLE COMMUNICATIONS, LLC, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Wilmington, Delaware (collectively "Comcast"). Comcast is the largest operator of cable television systems in the United States with approximately 24 million subscribers.

23. Defendant COXCOM, INC. (hereinafter "Cox") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. Cox is the third largest operator of cable television systems in the United States with approximately 6.7 million subscribers.

24. Defendant THE DIRECTV GROUP, INC. (hereinafter "DIRECTV") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in El Segundo, California. Defendant DIRECTV is the largest direct broadcast satellite television provider in the United States with approximately 16 million commercial and residential customers

25. Defendant ECHOSTAR SATELLITE L.L.C. (hereinafter "EchoStar") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Englewood, Colorado. Defendant EchoStar (which markets its services as DISH) is the second largest direct broadcast satellite television provider in the United States with more than 13 million subscribers.

26. Defendant CABLEVISION SYSTEMS CORPORATION (hereinafter "CSC") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Bethpage, New York. CSC is one of the larger operators of cable television systems in the United States with approximately 3 million subscribers.

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III.

JURISDICTION AND VENUE

27. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for treble damages, injunctive relief, costs of suit and a reasonable attorneys' fee, against defendants for the injuries sustained by plaintiffs and Class members by reason of defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

28. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 1332(d) and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

29. Venue is proper in this District pursuant to 15 U.S.C. §§ 15, 22 and 26, and 28 U.S.C. § 1391(b) and (c) because each defendant maintains an office, may be found and/or transacts business within this District. Moreover, many of the acts alleged in this Complaint giving rise to plaintiffs' claims occurred in, were directed from, and/or had effects in, this District.

IV.

CLASS ACTION ALLEGATIONS

30. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and the following Class:

a. All persons residing in the United States who subscribe to "expanded basic cable" provided by one of the cable television or direct broadcast satellite television provider defendants within four (4) years of the date of the filing of this Complaint ("Class"). Expressly excluded from the Class are defendants and their subsidiaries, affiliates, officers, directors,

and employees.

31. Certification of the Class is appropriate pursuant to Fed. R. Civ. P. 23(a). The members of the Class are so numerous that joinder of all members would be impracticable. There are millions of households who subscribe to cable television or direct broadcast satellite television.

32. There are common questions of law or fact, among others, including:

a. Have the defendants engaged in collaborative activity to preclude cable/satellite subscribers from securing unbundled cable programming apart from "basic" cable service;

b. Whether, as a result of the antitrust violation as set forth in this Complaint, plaintiffs and the Class are entitled to damages, equitable relief or other relief, and the amount and nature of such relief;

c. Whether defendants acted on grounds generally applicable to the Class, making injunctive relief appropriate;

d. Whether a Class can be certified pursuant to Fed. R. Civ. P. 23(b)(3); and

e. Whether, alternatively, a Class can be certified pursuant to Fed. R. Civ. P. 23(b)(2).

33. Plaintiffs' claims are typical of the claims of the Class, because plaintiffs and all members of the Class were injured economically by the same wrongful practices of defendants described in this Complaint. Plaintiffs' claims arise from the same practices and course of conduct that gave rise to the claims of the Class members, and are based on the same

legal theories. There is an economic or dollar value that can be assigned to the cable subscribers' right to choose the channels he/she wishes to buy. The economic value of this right to choose is common to all Class members. The only difference between plaintiffs and individual members of the Class could be the amount of overcharge sustained, under an alternative damage analysis and this difference does not bar or in any way impair class certification.

34. Plaintiffs will fairly and adequately represent the interests of the members of the Class. Plaintiffs' interests are the same as, and not in conflict with, the other members of the Class. Plaintiffs' counsel is experienced in class action and complex litigation.

35. Questions of law or fact common to the members of the Class predominate and a class action is superior to other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by Class members are likely to be in the millions of dollars, the individual damages incurred by each Class member resulting from the wrongful conduct alleged are, as a general matter, too small to warrant the expense of individual suits. The likelihood of individual members of the Class prosecuting separate claims is remote and, even if every Class member could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. Plaintiffs know of no difficulty to be encountered in the management of this

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action that would preclude its maintenance as a class action and certification of the Class under Rule 23(b)(3) is proper.

36. Relief concerning plaintiffs' rights under the laws herein alleged, and with respect to the Class, would be proper. Defendants have acted or refuse to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with regard to members of each Class as a whole and certification of the Class under Rule 23(b)(2) is proper.

V.

NATURE OF TRADE AND COMMERCE

37. The relevant product market in this case is multichannel video programming services licensed and/or sold through multichannel video programming distributors ("MPVDs") including cable television distributors (including those named as defendants), direct broadcast satellite distributors (including those named as defendants), and telecommunications/fiber optic distributors to the consuming public.

38. The relevant geographic market is the United States as a whole. There may also be appropriate submarkets delineated primarily by the geographic area in which a particular cable system in enfranchised to operate. While the restraints alleged herein operate nationally, they do so in two stages: the contractual restraints on all distributors operate nationally and are then imposed both nationally and locally by the distributors to the detriment of consumers as explained herein.

39. Cable providers and direct broadcast satellite providers may lawfully supply a bundled service known as "basic cable" which means a tier or group of programming services (channels) to which a subscription is required for access to other "tiers" of cable service offered by the cable distributor and direct broadcast satellite distributor defendants. Basic

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cable includes the retransmission of local television broadcast signals and public, educational and government access channels.

40. In 1992, the Cable Consumer Protection and Competition Act became law. That legislation was designed, inter alia ,to insure that broadcast stations (the major networks owned by programmers defendants named herein) would be compensated for the retransmission of those broadcast channels (and other channels) on cable. This retransmission consent "morphed into the bludgeon used by media conglomerates to ensure their ancillary cable networks get favorable distribution in exchange for allowing cable companies the right to use their network affiliates' broadcast signals." Forbes, December 13, 2004, p. 166.

41. Each programmer defendant owns television program(s) and some interest in one or more television channels. (See Exhibit 1). For example, NBC (80% of which is owned by General Electric Company) operates the NBC broadcast network as well as cable channels USA Network (the number one rated cable channel), Bravo, MSNBC a 24- hour news channel and the Spanish-language network Telemundo. NBC also is a major producer of programming, including, among others, the series "Law and Order." Defendant Viacom operates MTV Networks, including MTV, MTV2, Nickelodeon (the top rated children's channel), Spike, Comedy Central, BET Networks and others, and is also a major developer of television programming including The Real World, Sponge Bob Square Pants, South Park and others. Defendant Disney owns and operates the broadcast channel ABC Television Network and all ESPN related cable channels and the Disney channel. Disney is also a major producer of television programming. Defendant Fox owns and operates broadcast and cable channels, including Fox News, FX and Fox Sports Net. Finally, defendant Turner owns part of the broadcast channel WB Network, (now

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CW), CNN, TBS, Turner Classic Films, Court TV and the leading film cable channel HBO. Turner is also a major programmer for television. Each of these programmers has a major broadcast channel (CBS, NBC, ABC, FOX, CW) and each programmer has, as explained above, cable channels which are deemed by the industry as absolutely necessary for a cable, satellite or fiber optic distributor to have available for resale to the consuming public. This market power gives each programmer extraordinary leverage in "negotiating" with distributors. As defendant Dish Network explained in recent comments to the FCC, "Broadcasters . . .[are] capitalizing on their power over broadcast programming – to acquire and create cable networks . . .[t]hese regulated entities have used their power to alter fundamentally the wholesale programming market."

42. Accordingly, there is a high degree of vertical integration in that defendants collectively own most of the significant broadcast and cable channels and are the dominant producers of television programming. For example, in Los Angeles there are about 60 channels that comprise the basic and expanded basic cable tiers. Of those 60 channels, thirteen (13) are entirely or partly owned by NBC/GE, nine (9) by Viacom, seven (7) by Fox, eleven (11) by Disney; Turner and Liberty Media combined own another sixteen (16) channels. In short, the programmer defendants have exercised market power to dominate the "expanded basic tiers."

43. Each of the programmer defendants, NBC, Viacom, Disney, Fox and Turner sells or licenses its unique, copyright programming or channels to the cable, satellite and telecommunications/ fiber optic distributors. In so doing, the programmers defendants require the distributors to purchase its broadcast and cable channels in a bundled package ("forced bundling"). If distributors want access to the major broadcast channels and the leading cable channels, e.g. USA, ESPN, CNN, etc., they must also acquire the

programmers' full line of cable channels. This forced bundling is mandated by written contracts, which are contracts in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), because they require the distributors to acquire properties which, if unbundled, either they would not acquire at all, or would separately negotiate channel-by-channel based upon consumer demand. The FCC has determined that if channels were sold on an unbundled basis, consumers would pay considerably less than the forced bundled price that derives from the programmers' market power. This practice of "forced bundling" is done by each programmer with the knowledge and anticipation that each other major programmer will do likewise and each does so with the intention to eliminate or suppress competition among and between the programmer defendants. These practices have undermined consumer choice , inflated prices for "cable" television and eliminated competition among and between the distributors.

44. When required to purchase bundled channels, all distributors, including those named as defendants, repackage these offerings and distribute them to the consuming public in bundled tiers of channels, usually some 50 or more channels. The distributors, including those named as defendants, do so because they are expressly required to do so in their respective written contracts with the programmer defendants which often designate exactly where on the expanded basic tiers their owned channels are to be offered. Moreover, the contracts of each programmer expressly prohibits (or may do so indirectly by nature of the pricing structure) each distributor, including those named as defendants, from offering consumers less than the "forced bundled" tiers, i.e., unbundled expanded basic cable television channels. As set forth below, numerous industry participants have made clear that but for programmer coercion

derived from their market power, they would offer such unbundled cable channels to consumers:

- **<u>Comments and of Charles W. Ergen, Chairman and CEO of defendant EchoStar and Echo Star:</u>**

"Unfortunately, the largest programmers, particularly those that own a big network, have the muscle to control the way that pay television providers offer programming to consumers.";

"In most instances, a single carriage agreement is signed [with programmers] to carry all content of a particular media company. . . .Such bundling of must-have and other content in a single deal is a well-established problem in the industry. . . .

Programmers do not merely seek carriage on a system, they limit how their content can and cannot be provided. . . .These restrictions on how MVPDs [Multichannel Video Programming Distributors] present their packages curtail the ability of MVPDs to design alternative programming packages."

These tiering limitations *coupled with bundling obligations* hamper our ability to differentiate our product. (Emphasis added).

- **<u>Comments of Charles Dolan, Chairman of defendant Cablevision and Cablevision</u>**:

"Fundamentally, [a la carte] would be better for the consumer"; "...we do not believe in the long term that selling programming a la carte will be detrimental to either programmers or cable operators.";

- **<u>Comments of Robert Quinn, Senior Vice President of AT&T and AT&T</u>**:

"We will be happy to offer a la carte programming as long as we are able to obtain access to the programming in that manner." Indeed, AT&T and other telecommunications companies initially announced that

they intended to enter the market and compete for consumers by offering smaller, custom tailored packages of channels for consumers. Those efforts have been stymied by the market power of the programmers.

- **Comments of the American Cable Association**:

This association is comprised of small cable companies throughout the United States. In its submission to the FCC, the association explained "how wholesale tying and bundling profoundly shape the channel offerings of small and medium-sized cable companies" and further acknowledges that "[e]ither channels are directly tied or the economic penalty for not carrying them forces bundled carriage." It concluded that "[c]urrent wholesale programming and retransmission consent practices cause substantial public interest harms."

- **Comments of Broadband Service Providers Association**.

This association is comprised largely of telephone companies that compete to display content through fiber optic lines. This group advised the FCC "[s]uch wholesale programming practices that include tying and bundling of content and the required placement on particular tiers constrain the way MVPDs can package their services to subscribers and their ability to respond to consumer demand in their competitive MVPD markets."

Other industry participants, including Verizon and Mediacom, as well as many smaller cable companies, have also publicly stated that they would offer unbundled programming to their subscribers if the programmers would permit them to do so. Many small cable companies have testified that they are coerced by programmers into taking channels they do not want, and forced to resell them to consumers who similarly do not want certain channels.

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The reason these distributors are forced into accepting bundled tiers that limit their ability to engage in legitimate competition for consumers based upon custom channel offerings is because the programmers defendants' market power (derived from their ownership and control of the major broadcast networks, cable networks and the copyrighted programming contained therein) prevents distributors from rejecting the demands of the programmer defendants.

Finally, in an editorial in the National Review Online dated November 30, 2007, the issue of unbundled programming was analyzed and the editorial states in part as follows:

> "All channels thus benefit from the bundling model, which allows them to access households *that might not otherwise be interested in their programming.* For this reason, TV programmers have signed contracts with cable companies that prohibit a la carte sales. ..." (Emphasis added).

45. Unbundling of cable channels is technologically and economically practicable because it is offered in numerous foreign countries including England, Canada, India, Hong Kong and Singapore. No cable or direct broadcast satellite provider in the United States offers cable channels to consumer subscribers on an unbundled basis. Aside from "basic cable," many consumers are, because of this bundled tier distribution method, forced to pay inflated prices for the channels they do want and do watch. For example, an estimated 40% of cable subscribers have little or no interest in sports and yet are required to accept the several ESPN programming channels which constitute a significant part (and cost) of the bundled tiered package and inflate the price paid by consumers for the channels that consumers really want. This produces an economic discrimination in price among and between consumers. Cable rates have

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more than doubled in the past ten years. Most cable channels are not actually watched by the subscriber. According to a Nielsen Media research report, the average cable subscriber is forced to pay for 85 channels that he/she does not watch in order to obtain the approximately 16 channels he/she does watch. This produces economic price discrimination among consumers. According to an Associated Press-Ipsos poll, 78% of respondents would prefer to choose and pay for their own tailored selection of channels. The second Federal Communications Commission study on this subject calculates that there is a net consumer welfare loss of about $100,000,000 resulting from the programmer-distributor contracts.

VI.

VIOLATIONS ALLEGED

Violations of Section 1 of the Sherman Act (15 U.S.C. §1)

46. Paragraphs 1- 45 are incorporated herein by reference with the same force and effect as though set forth at this point in full.

47. The foregoing series of contracts between the programmer defendants and the cable and direct broadcast satellite provider defendants constitutes a series of contracts and/or combinations among and between the named defendants which unreasonably restrain trade and commerce in the relevant product market in the United States in violation of Section 1 of the Sherman Act.

48. Consumers, including the named plaintiffs and the putative Class, have been injured in their business and property because they have been deprived of choice, and have paid inflated and discriminatory prices for cable television programming.

49. Competition, including price competition at the consumer level for multi-channel video programming services has been, and will continue

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to be restrained, suppressed or eliminated as a result of the contracts and combinations described herein.

50. Competitors, actual and potential, have been, and will continue to be, restrained from vigorously competing with one another for selling and acquiring cable programming services as a result of the contracts and combination described herein.

51. As a direct result of the unlawful actions of defendants, and each of them, plaintiffs and Class members have been deprived of choice and have paid significantly more for cable and satellite subscriptions than they would have in the absence of the illegal agreements. As a result, plaintiffs and the Class have suffered antitrust injury in an amount not presently known with precision but which is, at a minimum, millions of dollars.

Prayer for Relief

WHEREFORE, plaintiffs, on behalf of themselves and others similarly situated, pray:

1. That this matter be certified as a class action with the Class defined as set forth above under Fed. R. Civ. P. 23(b)(3), or in the alternative Fed. R. Civ. P. 23(b)(2), and that the named plaintiffs be appointed Class Representatives and their attorneys be appointed Class Counsel;

2. That judgment be entered against defendants, and each of them jointly and severally, for the treble damages as a result of defendants' violations of Section 1 of the Sherman Act, and that plaintiffs be awarded a reasonable attorneys' fee and the costs of suit as required by Section 4 of the Clayton Act;

3. That the Court enter an order requiring defendants, and each of them, to immediately cease the wrongful conduct as set forth above and specifically enjoining defendants from unlawfully bundling

expanded basic cable channels and ordering defendant cable providers and direct broadcast satellite providers to notify their subscribers that they each can purchase on an unbundled basis except for "basic cable"; and

4. For such other and further relief as to the Court may seem just and proper.

Dated: May 1, 2009

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
DAVID W. KESSELMAN
COURTNEY A. PALKO
T. GIOVANNI (JOHN) ARBUCCI

By: ______________________
Maxwell M. Blecher
Attorneys for Plaintiffs

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JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury pursuant to the Federal Rules of Civil Procedure, Rule 38(b) and Local Rule 38-1.

Dated: May 1, 2009

BLECHER & COLLINS, P.C.
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By: ______________________
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EXHIBIT 1

WHO OWNS WHAT

NETWORK	OWNER
ESPN	DISNEY
NICKELODEON	VIACOM
ESPN2	DISNEY
TNT	TIME-WARNER
SCI-FI CHANNEL	NBC-UNIVERSAL
CNN	TIME-WARNER
DISNEY	DISNEY
CNBC	NBC-UNIVERSAL
BRAVO	NBC-UNIVERSAL
USA	NBC-UNIVERSAL
MTV	VIACOM
AMC	RAIBOW MEDIA
FOX NEWS CHANNEL	NEWS CORP (FOX)
FX	NEWS CORP (FOX)
ABC FAMILY	DISNEY
MSNBC	NBC-UNIVERSAL
TV LAND	VIACOM
DISCOVERY	DISCOVERY
NFL	NFL
CARTOON NETWORK	TIME-WARNER
ANIMAL PLANET	DISCOVERY
HISTORY CHANNEL	A & E (WITH NBC AND DISNEY)
TLC (THE LEARNING CHANNEL)	DISCOVERY
TRAVEL	DISCOVERY
BET	VIACOM
SPIKE	VIACOM
COMEDY CENTRAL	VIACOM
HGTV (HOME & GARDEN)	E.W. SCRIPPS
E!	COMCAST (WITH DISNEY)
TBS	TIME-WARNER
VH1	VIACOM
OXYGEN	OXYGEN

	THE WEATHER CHANNEL	LANDMARK COMM.
	LIFETIME	LIFETIME ENTERTAINMENT (THE HEARST CORPORATION AND DISNEY)
	A&E	A&E (WITH NBC AND DISNEY)
	FOOD NETWORK	E. W. SCRIPPS
	HALLMARK	CROWN MEDIA
	COURT TV	TIME-WARNER
	COUNTRY MUSIC TELEVISION	VIACOM

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 515 South Figueroa Street, Suite 1750, Los Angeles, California 90071.

On **May 1, 2009**, I served the foregoing document(s) described as: **STIPULATION REGARDING FILING OF PLAINTIFFS' THIRD AMENDED COMPLAINT AND SETTING FORTH FORECLOSURE MOTION PROCEDURE** on the interested parties in this action as follows:

Mailing Information for Case 8:04-cv-01455-CJC-AJW

✔ (By CM/ECF): Pursuant to the Court's electronic filing and service system, a copy will be transmitted to the registered users.

Manual Notice List: The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who therefore require manual noticing).

Wyatt Evan Bloomfield
Gibson Dunn and Crutcher
333 South Grand Avenue
Los Angeles, CA 90071

☐ (By E-Mail): Pursuant to agreement by the parties, the foregoing document was transmitted via electronic mail to the addressee(s) indicated above.

✔ (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED ON **May 1, 2009**, at Los Angeles, California.

Lorelei L. Gerdine

Lorelei L. Gerdine

EXHIBIT D

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DATE STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants	)	File No. CSR-8196-P

FILED/ACCEPTED
SEP 17 2009
Federal Communications Commission
Office of the Secretary

ANSWER TO PROGRAM ACCESS COMPLAINT

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September 17, 2009

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EXHIBIT 1

Jeremy I. Bulow and Bruce M. Owen, *Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden*

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Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden

By Jeremy I. Bulow and Bruce M. Owen[1]

Cablevision Systems Corp. ("Cablevision") and Madison Square Garden L.P. ("MSG") have asked us to analyze from an economic perspective the AT&T complaint regarding the decision of Cablevision/MSG not to license its terrestrially-delivered MSG HD and MSG+ HD program services to AT&T for distribution to its U-verse subscribers in Connecticut. In its complaint, AT&T argues that this decision is anticompetitive because the lack of a license for MSG HD and MSG+ HD reduces AT&T's ability to provide a competing video service.[2]

We analyze these claims and conclude that:

1. AT&T provides no evidence of harm to consumers or to competition from the alleged refusal of Cablevision/MSG to provide MSG HD and MSG+ HD.

    a. MSG HD and MSG+ HD are not essential to successful entry or to the competitive effectiveness of MVPDs in Connecticut.

    b. AT&T does not demonstrate that either Cablevision or MSG has monopoly power.

    c. The fact that MSG HD and MSG+ HD are licensed to Cablevision's direct competitors DirecTV and RCN is strong evidence that there is no barrier here to efficient transactions, and therefore no need for compulsion. Conversely, the absence of a

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[1] Jeremy Bulow is the Richard A. Stepp Professor of Economics at Stanford Business School. He served as the Director of the Bureau of Economics of the Federal Trade Commission from 1998-2001. Bruce Owen is the Morris M. Doyle Centennial Professor in Public Policy at Stanford. He served as chief economist of the Antitrust Division of the U.S. Department of Justice from 1979-1981.

[2] *AT&T Services, Inc. and Southern New England Telephone Company D/B/A AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Program Access and Section 628(b) Complaint ("Complaint"), August 13, 2009.

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deal with AT&T therefore does not stand as evidence of anticompetitive purpose or effect.

2. AT&T fails to demonstrate that Cablevision/MSG's strategy has anti-competitively harmed AT&T.

3. There are important potential consumer welfare benefits from permitting Cablevision/MSG the freedom to pursue a competitive strategy of licensing its content to some competing distributors but not others. These potential benefits include—

   a. Increased product differentiation, leading to a greater variety of video content and related services in the marketplace, resulting in services attuned to a wider variety of consumer tastes, and

   b. Increased producer incentives to invest in the future innovative services, product attributes, and content that consumers value most highly.

1. Competition Analysis of AT&T's Complaint

An examination of the complaint and the available facts rules out the possibility that Cablevision/MSG's terrestrial exclusivity policy (vis-à-vis AT&T—as explained below, it is a selective licensing strategy, not a general policy) is harmful to competition. The fact that MSG HD and MSG+ HD are licensed to Cablevision's direct competitors DirecTV and RCN is strong evidence that there is no barrier here to efficient transactions, and therefore no need for compulsion. Conversely, the absence of a transaction between Cablevision/MSG and AT&T for the licensing of MSG HD or MSG HD+ therefore does not stand as evidence of anticompetitive purpose or effect.

The purpose of selective licensing is to permit Cablevision/MSG to differentiate its product from that of its closest competitors. Product differentiation is competition in "product space," and is

[[end highly confidential]].

In effect, then, AT&T's own data demonstrate that it enjoys **[[begin highly confidential]]** **[[end highly confidential]]** *more* overall video sales per living unit passed in Connecticut and **[[begin highly confidential]]** **[[end highly confidential]]** *more* HD sales per living unit passed in the state. This is hardly evidence that AT&T has been badly harmed in Connecticut and that it has been deprived of a "must have" product.

AT&T's only quantitative measure of injury is therefore meaningless. Just looking at AT&T's HD penetration rate in Connecticut does not say anything about its *overall* penetration rate, and AT&T's absolute success is what matters for the viability of the business. Even a statistically significant finding of some properly-measured effect on AT&T would not be sufficient to indicate either the direction or the magnitude of the consumer welfare consequences, and would merely underline the necessity for a consumer welfare measurement.

Furthermore, one of the reasons that AT&T may be doing relatively less well in selling to HD customers in Connecticut than it is doing in terms of overall customer acquisition is Cablevision's aggressive strategy of offering over 60 HD channels free to subscribers, compared to AT&T's requirement that consumers pay a minimum of $10 more to receive HD. This pro-consumer action by Cablevision would be expected to increase its relative share of customers who upgrade to HD, relative to other markets where AT&T's cable competition may not undertake such a pro-consumer strategy.

c. AT&T's Claims of Unfair Competition

AT&T claims that Cablevision/MSG's decision to license some distributors but not to license AT&T qualifies as unfair competition and that an anticompetitive effect can be strongly inferred from Cablevision/MSG's "sacrificing the short-term benefits" of licensing MSG and MSG+ in HD

format to AT&T.[14] In fact, no evidence has been provided that Cablevision/MSG is sacrificing even short-term benefits. The decision not to accept AT&T's offer for the MSG HD and MSG+ HD rights means that Cablevision must live with **[[begin highly confidential]]** **[[end highly confidential]]**, but Cablevision presumably believes the decision will yield immediate revenue increases because distinguishing itself from competitors will attract additional subscribers, and those additional subscribers will be more profitable to it than **[[begin highly confidential]]** **[[end highly confidential]]**. No evidence has been provided, and it is facially implausible, that this decision will be profitable for Cablevision/MSG only in the long run by eliminating AT&T and other MVPDs as effective competitors.

AT&T also makes a claim that by denying it access to MSG HD and MSG+ HD Cablevision/MSG is requiring AT&T to engage in two-level entry.[15] But even taking the first level as HD RSNs, AT&T clearly is not foreclosed from competing because it has access to numerous such RSNs – and even with respect to the games specific to MSG, AT&T is not foreclosed because it has access to those games through its license to distribute MSG and MSG+.

AT&T cites Cablevision advertising that tells consumers that some competitors, including AT&T, do not offer MSG HD and MSG+ HD.[16] Even if it is true (as Cablevision hopes) that this difference makes Cablevision more attractive to consumers, it does not address the question of whether AT&T is precluded from providing alternative channel line-ups (and other services) that produce equivalent overall consumer welfare in the marketplace.

In 1992 Congress was concerned that vertically integrated cable operators, then the only distributors of retail "multichannel" video program services ("MVPDs"), would refuse to license programming under their control to direct broadcast satellite ("DBS") providers, the first of

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[14] Complaint at ¶¶62, 70.

[15] Complaint at ¶73.

[16] Complaint at ¶¶62, 70-72.

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which were about to launch. The circumstances today are far different. As the D.C. Circuit recently observed in the course of vacating the Commission's cable ownership limit,

> [T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers. . . . [There is] overwhelming evidence concerning 'the dynamic nature of the communications marketplace' 47 U.S.C § 533(f)(2)(E), and the entry of new competitors at both the programming and the distribution levels . . . .[17]

Today any given viewer can still be reached through the incumbent cable operator. But now the same viewer also can be reached via one (or in some cases two) cable operators, plus the local telephone company and two competing DBS systems (DirecTV and DISH)—bringing the number of competitors to at least four. Online video distribution is growing and wireless (3G and future 4G) distribution of video increasingly offers additional viewer alternatives.[18] In short, the

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[17] Comcast Corporation v. F.C.C., D.C. Circuit No. 08-1114, August 28, 2009 slip op. at 14.

[18] The success of the iPhone, associated exclusively with AT&T 3G wireless service and including video content, is well-known. Verizon also offers wireless mobile video services (V Cast). (See http://support.vzw.com/faqs/V%20CAST/faq.html#item1.) YouTube is said to be in negotiations to add subscription-based motion picture content to its service, which is available on the iPhone as well as online. New York Times Online, September 3, 2009 http://www.nytimes.com/2009/09/03/technology/internet/03tube.html?scp=2&sq=youtube&st=cse Content providers are supplying increasing quantities of video service online. "More than a dozen TV networks— including broadcaster CBS Corp.— agreed to join Comcast Corp.'s nationwide test of an online-video subscription offering, as companies seek additional revenue streams amid the advertising slump." Nat Worden, TV Networks Join Comcast Web Test, WALL

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market in which cable operators compete with other video distribution channels has become at least as competitive in structure as the vast majority of commercial enterprise in the United States.

In summary, AT&T has not shown that Cablevision/MSG's conduct falls within established economic principles condemning anticompetitive behavior, constitutes an unfair method of competition, or hinders significantly AT&T's ability to compete; much less has AT&T demonstrated harm to consumers.

3. Consumer Benefits of Exclusivity

AT&T argues that Cablevision/MSG should be ordered to make its MSG HD and MSG+ HD services available to Cablevision's competitor, AT&T, at a reasonable price, on the grounds that AT&T is otherwise significantly hindered as a competitor. AT&T also claims that Cablevision/MSG's conduct has no efficiency rationale—i.e., that there are no benefits for consumers.

AT&T's complaints notwithstanding, it does not make sense from the perspective of sound economic policy for the Commission to require Cablevision/MSG to make the MSG HD programming services available to Cablevision's competitor, AT&T, at a regulated "reasonable" price. To do so could be anticompetitive (i.e., harmful to consumer welfare) because it would mandate a transaction that might be inefficient at the required price, or possibly at any price. Such a requirement also has the potential to affect pricing, investment, and innovation decisions in video distribution and related businesses.

Requiring firms to engage in such inefficient transactions discourages competition in the important dimension of programming content differentiation among MVPDs and among content providers. Indeed, the discretion to choose one's distribution channels, up to and

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